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In the Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD., PETITIONER

v.

CHESAPEAKE BAY FOUNDATION, INC. AND
NATURAL RESOURCES DEFENSE COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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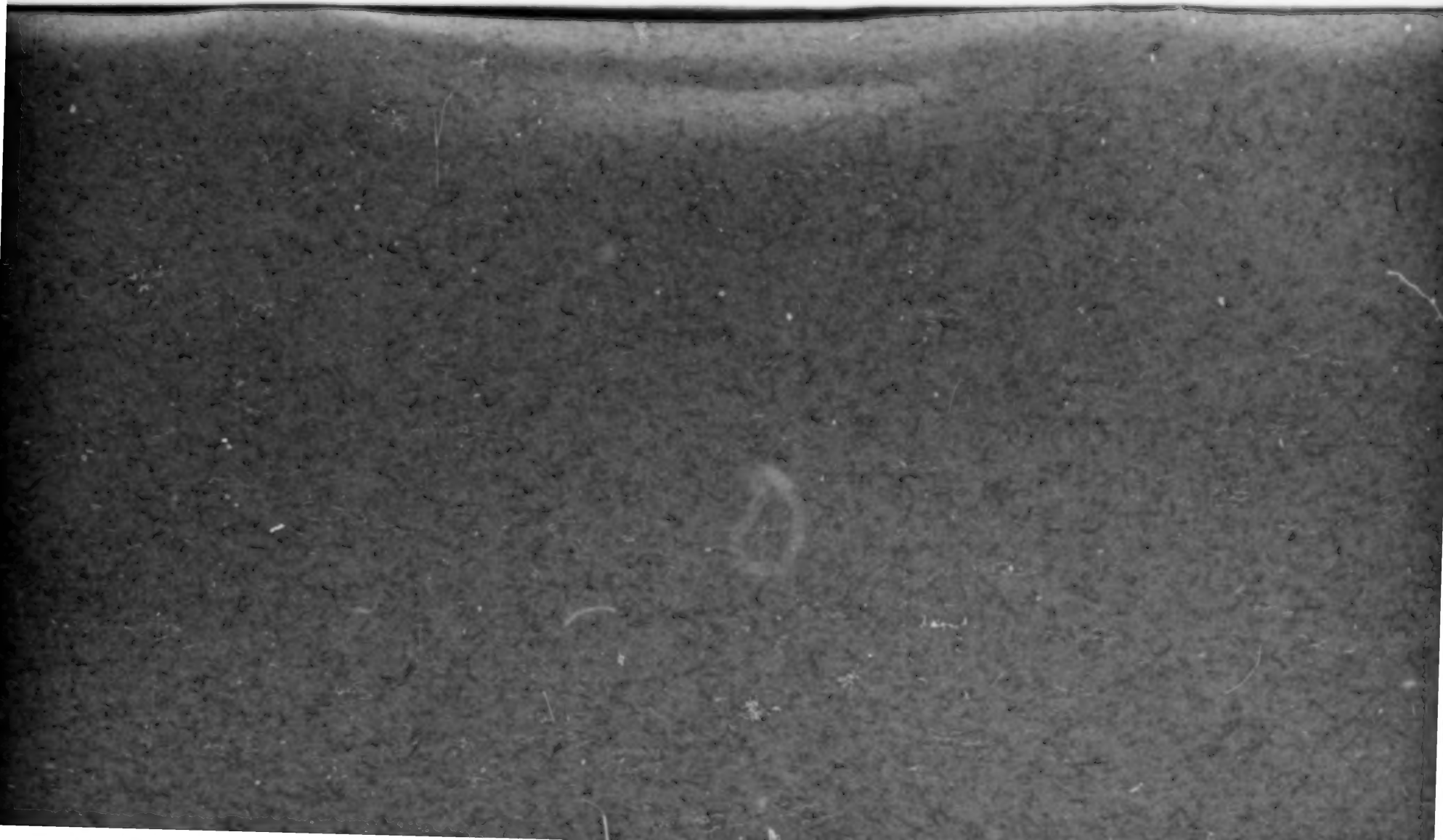

QUESTION PRESENTED

Whether a district court must dismiss a Clean Water Act citizen enforcement action against a defendant that has continuously violated its discharge permit unless the citizen demonstrates that the defendant has committed discrete permit violations on or after the day the complaint was filed.

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INTEREST OF THE UNITED STATES

The United States plays a lead role in enforcing the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.* (CWA). See CWA § 309, 33 U.S.C. 1319. It is also a potential defendant in citizen enforcement actions against federal facilities. See CWA § 313, 33 U.S.C. 1323; CWA § 505, 33 U.S.C. 1365. The present case, in which the United States participated as amicus curiae in the court of appeals, concerns the jurisdictional prerequisites for a private suit brought to obtain compliance with the Clean Water Act. Its resolution will have a direct and substantial effect on systematic enforcement of the Act.

STATEMENT

The Clean Water Act permits private citizens to bring civil actions in certain situations to enforce the Act's pollution control requirements. In this instance, respond-

ents Chesapeake Bay Foundation, Inc. and the Natural Resources Defense Council, brought an action against Gwaltney of Smithfield, Ltd., requesting the court to enjoin Gwaltney's pollution discharges and to assess civil penalties. The district court entered partial summary judgment finding Gwaltney to have violated and to be in violation of the Act and held a trial to determine an appropriate remedy. Gwaltney then moved to dismiss the action, arguing that the court lacked subject matter jurisdiction because Gwaltney had not exceeded its discharge permit limitations since the suit was filed. The district court denied Gwaltney's motion, assessed a $1.3 million penalty, and ordered the company to provide respondents with monthly discharge monitoring reports indicating Gwaltney's compliance status. The court of appeals affirmed.

A. The Clean Water Act's NPDES Program

The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA § 101 (a), 33 U.S.C. 1251(a)).[1] As a part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including Section 402, which establishes the National Pollutant Discharge Elimination System (NPDES) (33 U.S.C. 1342). See 33 U.S.C. 1311(a).

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a).[2]

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[1] The Clean Water Act was recently amended and reauthorized through the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, which has not yet been officially codified. We shall cite to the Statutes at Large in describing relevant sections of that Act.

[2] See generally *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 7-9; *EPA* v. *California ex rel. State Water*

Section 402(b) allows each State to develop and administer its own permit program, provided that the program meets federal requirements. 33 U.S.C. 1342(b). And Section 402(c) provides that EPA shall suspend issuance of federal permits upon determining that a State has adequate authority to implement and enforce the permitting program within the State. 33 U.S.C. 1342(c).[3]

If a NPDES permit holder fails to comply with the specified permit conditions, the federal and state governments may take enforcement action. Section 309 of the Clean Water Act empowers EPA to enforce a federal or state permit through a variety of administrative, civil, and criminal mechanisms. See 33 U.S.C. 1319. A state may take similar action, under appropriate state law, in response to a violation of a state-issued permit. See CWA § 402(b)(7), 33 U.S.C. 1342(b)(7). In addition, Section 505(a)(1) of the Clean Water Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of * * * an effluent standard or limitation under this chapter" (33 U.S.C. 1365(a)(1)), which includes a federal or state NPDES permit or condition thereof (33 U.S.C. 1365(f)). 33 U.S.C. 1365. Section 505 specifically authorizes the district courts to enforce the permit requirements and impose civil penalties, which are payable solely to the Treasury. 33 U.S.C. 1365.

Resources Control Board, 426 U.S. 200, 205-208 (1976). NPDES permits generally specify particular effluent parameters, including permissible concentrations of particular pollutants, based on daily and monthly averages. NPDES permits also require, pursuant to Section 402(a)(2) (33 U.S.C. 1342(a)(2)), that the permittee monitor its effluent and submit reports (typically on a monthly basis) disclosing the results. Such reports, generally known as discharge monitoring reports (DMRs), are available to any interested person upon request. See CWA § 308, 33 U.S.C. 1318; 40 C.F.R. 122.41(h)(4).

[3] If the Administrator subsequently determines that a State is failing to administer a program in accordance with federal requirements, he may, after notice to the State, withdraw approval. CWA § 402(c)(3), 33 U.S.C. 1342(c)(3).

B. The Present Dispute

The Commonwealth of Virginia has established a federally approved state NPDES program conducted through the Virginia State Water Control Board. See Va. Code Ann. §§ 62.1-44.2 *et seq.* (1982). In 1974, the Board issued an NPDES permit to ITT-Gwaltney, Inc., governing that company's discharges from its hog-slaughtering and packing plant into the Pagan River, a tributary of the James River and the Chesapeake Bay. The permit, which was reissued in 1979 and amended in August 1980, sets forth seven effluent parameters.[4] Petitioner Gwaltney of Smithfield, Ltd. (Gwaltney) assumed obligations under the amended permit on October 27, 1981, following its acquisition of the assets of ITT-Gwaltney, Inc. Pet. App. 3a-5a; J.A. 56-58, 72-74; C.A. App. 307-310.

On February 29, 1984, respondents sent a formal notice to Gwaltney, the Administrator of EPA, and the Virginia State Water Control Board, declaring respondents' intention to commence a citizen suit against Gwaltney under Section 505 of the Clean Water Act demanding that Gwaltney comply with its NPDES permit.[5] Respondents, relying on Gwaltney's own discharge monitoring reports (DMRs) (see note 2, *supra*), recited that over the previous five years Gwaltney's facility had repeatedly violated conditions of its permit limiting discharges of total Kjeldahl nitrogen (TKN), fecal coliform/chlorine, and other pollutants.[6] Respondents provided a table de-

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[4] The permit specifies effluent standards for oil and grease, total suspended solids, total Kjedahl nitrogen, biological oxygen demand, fecal coliform, chlorine, and pH.

[5] Section 505(b)(1)(A) of the Clean Water Act provides that a citizen must give 60 days' notice to EPA, the state, and the alleged violator, before commencing a citizen suit. 33 U.S.C. 1365(b)(1)(A). The citizen may not proceed with its suit if EPA or the state elects to commence its own compliance suit. CWA § 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B).

[6] The NPDES permit's limitation on TKN addresses the problem of contamination from organic nitrogen and ammonium compounds

tailing those violations. The table (which underestimated Gwaltney's actual violations) showed, for example, that Gwaltney had exceeded permit limitations 57 times in the previous 12 months, that it was in violation in 9 of those 12 months, and that it had violated its permit 36 times in the previous 3 months. Pet. App. 4a-5a, 79a-84a; Complaint Exh. A.

On June 15, 1984, respondents filed a citizen suit against Gwaltney under Section 505, requesting the district court to provide declaratory and injunctive relief requiring Gwaltney to comply with its NPDES permit, to impose civil penalties, and to award attorneys' fees and costs. Pet. App. 79a-84a. The complaint incorporated by reference the February 29, 1984, notice letter and its attached table as well as a second table indicating that Gwaltney reported 4 additional violations from February through March 1984 (Complaint ¶ 17 & Exhs. A & B). Gwaltney's subsequent DMRs revealed a total of 13 violations from February through May 1984. See J.A. 117.

The district court granted partial summary judgment on August 30, 1984, declaring Gwaltney "to have violated and to be in violation" of the Clean Water Act

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that, when released into a river, can oxidize and consume dissolved oxygen necessary to sustain fish and other river species. Gwaltney treats these nitrogen-containing compounds through retention of effluent in lagoons containing microbes that complete the "nitrification" process prior to discharge. Violations of the TKN standards represent a failure to nitrify the effluent adequately. See J.A. 110-111. The NPDES permit's limitations on fecal coliform and chlorine address the problem of biological contamination in Gwaltney's wastewater. The pork processing plant's untreated effluent contains bacterial contamination from animal wastes that can threaten public health. Gwaltney reduces these fecal coliforms through chlorination. Violations of the fecal coliform standards and the minimum chlorine standards represent a failure to provide adequate chlorination. Violations of the maximum chlorine standards represent overchlorination, which can be toxic to the river's life forms. See J.A. 100.

(J.A. 59).[7] The court then held a trial to determine an appropriate remedy. On May 16, 1985, six months after the trial but before the district court rendered its decision, Gwaltney moved for dismissal for want of subject matter jurisdiction (J.A. 69). Gwaltney asserted that Section 505(a)(1) of the Clean Water Act requires, as a jurisdictional prerequisite to a citizen suit, that the defendant be "in violation" (33 U.S.C. 1365(a)(1)) of a permit requirement at the time the suit is filed and that, because the last recorded violation cited by respondents occurred several weeks before respondents filed their complaint, the district court lacked jurisdiction.[8]

The district court denied Gwaltney's motion to dismiss and assessed a civil penalty of $1,285,322 for the company's violations of its NPDES permit (J.A. 71-120). The court concluded that Section 505 authorizes citizens to bring enforcement actions on the basis of both present and wholly past violations (J.A. 78-88). The

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[7] The court found that the Gwaltney pork processing facility had violated its NPDES permit on at least 237 occasions from January 1979 to June 15, 1984 (J.A. 58). Gwaltney did not contest the existence of the violations, but later filed a motion for reconsideration with respect to those violations that had occurred prior to its purchase of the facility (Motion For Rehearing (Sept. 4, 1984)). The court amended its order accordingly (J.A. 61-62). The parties later stipulated that between the date Gwaltney assumed responsibility for the facility and the entry of the court's partial summary judgment, Gwaltney violated the TKN standard 87 times, the chlorine standard 34 times, the fecal coliform standard 31 times, and the oil and grease standard 3 times (Pet. App. 87a).

[8] Gwaltney relied on *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985), which held that a citizen's allegation of an isolated and nonrecurring discharge of oil, resulting from a pipeline leak that occurred well before the filing of suit, was "insufficient to satisfy the section 1365 requirement that the defendant be alleged to be in violation of an effluent standard, limitation, or order" (*id.* at 397). As *Hamker* indicates, Section 505(a)(1) authorizes a citizen suit when the defendant "is alleged to be in violation" of the Act's requirements. 33 U.S.C. 1365(a)(1).

court held, in the alternative, that respondents satisfied Section 505's jurisdictional requirements because that section authorizes a private enforcement action against a defendant "who is alleged to be in violation of" permit requirements (33 U.S.C. 1365(a)(1)) and respondents' complaint contained a good faith allegation of a continuing violation (J.A. 83 n.8).[9] The court explained (*ibid.*):

> It was not until Gwaltney had experienced a full winter without problems that it could make its motion to dismiss based on its present compliance, with a secure belief that it was indeed in compliance. * * *. On these facts, the Court believes that even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here.

The district court then conducted a detailed review of the evidence of permit violations and assessed a civil penalty on the basis of criteria set forth in EPA's guidelines for civil penalty settlements (J.A. 89-115). See *EPA Civil Penalty Policy*, [Federal Laws] Env't Rep. (BNA) 41:2991 (June 1, 1984). The court also ordered Gwaltney to provide respondents with future discharge monitoring reports (J.A. 119-120).

The court of appeals affirmed (Pet. App. 1a-25a). The court rejected Gwaltney's argument that respondents' suit should be dismissed for lack of subject matter jurisdiction. It reasoned that Section 505's authorization of suits against persons "alleged to be in violation" (33 U.S.C. 1365(a)) of the Clean Water Act "can be read to comprehend unlawful conduct that occurred only prior

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[9] The complaint stated that Gwaltney "has continued to violate its discharge permit since [respondents'] letter dated February 29, 1984," and that respondents "believe and allege that without the imposition of appropriate fines and issuance of an injunction, [Gwaltney] will continue to violate its NPDES permit to the further injury of [respondents]" (Pet. App. 82a-83a).

to the filing of a lawsuit as well as unlawful conduct that continues into the present" (Pet. App. 8a-9a). The court concluded that this reading is consistent with the Act's structure and legislative history (*id.* at 9a-15a).[10]

The court of appeals further observed that "Section 505 actually confers jurisdiction in cases of a person '*alleged* to be in violation' of an effluent standard" (Pet. App. 7a n.9 (emphasis in original)). It noted the district court's alternative holding that a citizen may meet Section 505's jurisdictional requirements through a good faith allegation of a present violation (*ibid.*). The court stated that a "very sound argument can be made that [respondents'] allegations of continuing violations were made in good faith" (*ibid.*), despite the absence of a permit violation at the time the complaint was filed, because "it was not at all clear at the time of filing in June 1984, that Gwaltney's new and unproven water treatment facilities would survive the coming winter without mishap" (*ibid.*). The court determined, however, that because Section 505 permits citizen suits seeking civil penalties for past violations, "we need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith" (*ibid.*).

Finally, the court of appeals concluded that the district court did not abuse its discretion in setting the amount of the civil penalty (Pet. App. 22a-25a).

SUMMARY OF ARGUMENT

Section 505 of the Clean Water Act states that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of" the Act's requirements. 33 U.S.C. 1365. The sole question in this case is whether a district court

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[10] The court acknowledged the Fifth Circuit's contrary holding in *Hamker* (see note 8, *supra*) but concluded that the case was arguably distinguishable and, in any event, should not be followed (Pet. App. 15a-18a).

must dismiss a citizen suit against a company that has continuously violated its Clean Water Act discharge permit unless the citizen demonstrates that the company has committed discrete permit violations on or after the day the complaint was filed. We submit that Section 505 quite clearly allows a citizen to initiate an action upon an allegation of a continuing violation. The citizen's allegation, if made in good faith and well grounded in fact, states a cause of action within the district court's jurisdiction. A court's jurisdiction may, of course, abate if the citizen's action becomes moot during the judicial proceedings. However, it is quite clear from the record here that this citizen action did not become moot.

Our analysis proceeds from the content and structure of the Clean Water Act's enforcement provisions. Congress has vested the EPA and the individual states with primary responsibility for enforcement of the Clean Water Act. CWA § 309, 33 U.S.C. 1319. The federal and state governments have broad authority to abate present violations through administrative and judicial actions and to penalize past noncompliance through criminal and civil penalties. See *ibid.* Congress has also authorized private citizens to join in the enforcement effort in certain limited circumstances. Section 505 of the Clean Water Act specifically authorizes private citizens to commence an enforcement action against persons who are "alleged to be in violation" of the Act. 33 U.S.C. 1365.

We believe that Section 505 requires a citizen to allege, as an essential element of his private enforcement action, that the defendant is presently failing to comply, on a continuous or intermittent basis, with the Act's requirements. That allegation, when made in good faith and well grounded in fact, states a cause of action within a federal court's subject matter jurisdiction. The plain language of Section 505 quite clearly specifies that the citizen need only allege—and not prove—present noncom-

pliance to state a cause of action. Section 505's legislative history and the Clean Water Act's overall structure and objectives fully support that interpretation.

The respondents here properly alleged that Gwaltney was failing to comply with its pollution discharge permit and therefore stated a cause of action within the district court's jurisdiction. Gwaltney's unrelenting pattern of violations, which—despite respondents' notice of intent to sue—continued up to the time the complaint was filed, fully established the reasonableness of respondents' allegations. Indeed, the district court ruled, on respondents' uncontested motion for summary judgment, that Gwaltney was "in violation" of the Act (J.A. 58).

The only remaining question is whether Gwaltney's subsequent claims of compliance should have divested the court of jurisdiction. That question is answered by applying well established mootness principles to the facts of this case. We believe that Gwaltney failed to show that the citizen's action was moot.

ARGUMENT

SECTION 505 OF THE CLEAN WATER ACT AUTHORIZES CITIZENS TO MAINTAIN A PRIVATE ENFORCEMENT ACTION AGAINST A COMPANY THAT REPEATEDLY VIOLATES ITS DISCHARGE PERMIT EVEN IF THE COMPANY COMMITS NO DISCRETE PERMIT VIOLATIONS ON OR AFTER THE DAY THE COMPLAINT IS FILED

A. The Clean Water Act Gives EPA And The Individual States Primary Responsibility For Ensuring Effective Enforcement Of The Act's NPDES Permit Program

The Clean Water Act establishes " 'an all-encompassing program of water pollution regulation.' " *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 9 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981)). It contains "unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citi-

zens." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); accord *International Paper*, slip op. 10. As one would expect, EPA and the individual states have primary responsibility for enforcement of the Clean Water Act's NPDES permit program. *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). Section 309 of the Act establishes five distinct federal enforcement mechanisms, allowing EPA to take action appropriate to the characteristics of the particular compliance problem. And Section 402 requires the states to provide similar remedies in formulating their own NPDES programs for EPA approval.

Section 309 sets forth two methods for EPA to ensure present and future compliance with permit requirements. Section 309(a) provides that when the Administrator of EPA discovers that any person "is in violation" of a federal or state NPDES permit requirement, "he shall issue an order requiring such person to comply with such * * * requirement, or he shall bring a civil action in accordance with subsection (b) of this section." 33 1319(a)(3).[11] Section 309(b) authorizes the Administrator "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." 33

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[11] Section 309(a)(1) provides that the Administrator may refer a violation of a state NPDES permit to the state for enforcement under its federally approved permitting program. 33 U.S.C. 1319(a)(1). If the state fails to take timely enforcement action, the Administrator may initiate an administrative or judicial enforcement action. *Ibid.* Section 309(a)(2) provides that if the state enforcement mechanisms are inadequate, the Administrator shall assume full enforcement responsibility within the state. 33 U.S.C. 1319(a)(2). Section 309(a)(3) specifically authorizes the Administrator to issue compliance orders, while Section 309(a)(4)-(6) set forth criteria for issuance of those orders. 33 U.S.C. 1319(a)(3)-(6).

U.S.C. 1319(b).[12] These two methods provide EPA with full authority to ensure that a party complies with NPDES permit requirements.

Section 309 also sets forth three methods for EPA to penalize noncompliance. Section 309(c) provides that any person who negligently or willfully violates an NPDES permit requirement shall be punished by a fine, imprisonment, or a combination of both sanctions. 33 U.S.C. 1319(c).[13] Section 309(d) provides, more generally, that any person who violates a permit requirement shall be subject to a judicially imposed civil penalty. 33 U.S.C. 1319(d).[14] And Section 309(g), added by Section 314 of the Water Quality Act of 1987 (see note 1, *supra*), provides that whenever the Administrator dis-

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[12] Section 309(b) provides that "[a]ny action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance." 33 U.S.C. 1319(b).

[13] Section 312 of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42, amended Section 309(c) of the Clean Water Act to expand significantly the reach of potential criminal liability and to increase the potential penalties. Under those amendments, a defendant who negligently violates a permit may be imprisoned for up to one year and may be fined up to $25,000 for each day the violation continues. 101 Stat. 42-43. These penalties are doubled in the case of a repeat offender. 101 Stat. 43. A defendant who knowingly violates a permit may be imprisoned for up to three years and fined up to $50,000 for each day the violation continues. *Ibid.* These penalties, again, are doubled in the case of a repeat offender. *Ibid.* Section 309(c), as amended, also imposes additional penalties for knowing endangerment of other persons, false statements, and tampering with monitoring devices. 101 Stat. 43-44.

[14] Section 313 of the Water Quality Act of 1987 amended Section 309(d) to increase the maximum civil penalty from $10,000 per day for each violation to $25,000 per day for each violation. 101 Stat. 45. It also amended Section 309(d) to specify certain factors—such as the seriousness, economic benefits and history of the violations—that are to be taken into account in assessing civil penalties. *Ibid.*

covers that a person has violated any permit condition or limitation, he may assess an administratively imposed civil penalty. 101 Stat. 46.[15]

Thus, the Clean Water Act grants EPA extraordinarily broad powers to compel compliance with NPDES permit requirements and to penalize noncompliance. The Act further provides that individual states that administer federally approved NPDES programs must have comparably broad enforcement authority.[16] Section 402(b)(1)(A) requires EPA to ensure that state programs exhibit adequate authority to issue permits that "apply, and insure compliance with" the Act's requirements (33 U.S.C. 1342(b)(1)(A)) and to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement" (33 U.S.C. 1342(b)(7)). EPA's regulations require, in turn, that state programs provide mechanisms to restrain violations through administrative and judicial action, and to impose criminal and civil penalties for violations. See 40 C.F.R. 123.27.[17]

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[15] Section 309(g) creates two classes of administrative civil penalties. Class I penalties, which respond to minor violations, are imposed through an informal administrative procedure and may not exceed $10,000 per violation or $25,000 in a single proceeding. 101 Stat. 46. Class II penalties, which respond to more serious violations, are imposed through a formal administrative adjudication and may not exceed $10,000 per day of violation or $125,000 in a single proceeding. *Ibid.*

[16] Indeed, Congress expected that the states would eventually assume the principal burdens of enforcing these permits. See, *e.g.*, H.R. Rep. 92-911, 92d Cong., 2d Sess. 115 (1972), *reprinted in* Senate Comm. on Environment and Public Works, 93d Cong., 1st Sess., 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 802 (Comm. Print 1973) [hereinafter *Leg. Hist.*].

[17] In the present instance, Virginia's NPDES permit program authorizes the State Water Control Board to issue orders requiring persons who have violated the terms and conditions of a certificate issued by the Board to comply with such terms and conditions

In short, Congress formulated detailed and comprehensive enforcement mechanisms that allow the federal and state governments to rectify present and past violations, tailoring their enforcement efforts in light of the willfulness, seriousness, and continuity of the permittee's noncompliance.

B. Section 505 Of The Clean Water Act Authorizes Private Citizens To Bring Civil Enforcement Actions Against A Person Who Is Alleged To Be In Violation Of NPDES Permit Requirements

Congress supplemented the Clean Water Act's broad governmental enforcement provisions through Section 505, which authorizes private citizens to bring civil enforcement actions in certain carefully defined situations. See 33 U.S.C. 1365.[18] Of particular relevance here, Congress determined that while the government may both enjoin permit violations and penalize purely past transgressions, citizen suits are directed toward ensuring present compliance. Section 505 accordingly provides that a citizen may commence a private enforcement action upon an allegation that a party is failing to comply with its NPDES permit.

(Va. Code Ann. § 62.1-44.15(8a)(iii) (Supp. 1986)). The Board may also bring a court action to enjoin ongoing violations (*id.* § 62.1-44.23 (1982)) and to seek imposition of civil penalties (*id.* § 62.1-44.32; *id.* § 62.1-44.15(8c) (Supp. 1986)).

[18] See *Middlesex County Sewerage Authority*, 453 U.S. at 14. Congress, recognizing that citizen suits should serve as an important but carefully circumscribed supplement to government enforcement efforts, placed a number of significant limitations on private enforcement actions. For example, a citizen contemplating a citizen suit must give pre-complaint notification to EPA, the state, and the alleged violater, and may not proceed with its suit if the government elects to commence its own compliance action. CWA § 505(b), 33 U.S.C. 1365(b). See note 5, *supra*. And the Water Quality Act of 1987 further provides that a citizen may not enter into a consent decree with the alleged violator without first giving the United States an opportunity to object to the proposed settlement. See § 504, 101 Stat. 75.

Section 505(a) states that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation" (33 U.S.C. 1365(a)). The meaning of that provision is clear. Section 505 requires a citizen to allege, as an essential element of his private enforcement action, that the defendant is failing to comply on a continuous or intermittent basis with his permit requirements. That allegation, when made in good faith and well grounded in fact (Fed. R. Civ. P. 11), states a cause of action under Section 505 that falls within a federal district court's subject matter jurisdiction.[19] It thus subjects the defendant to the full power of the court "to enforce such an effluent standard or limitation * * * and to apply any appropriate civil penalties under section 1319(d) of this title." CWA § 505(a), 33 U.S.C. 1365(a).[20]

The plain language of the statute compels this construction.[21] Section 505(a) allows private enforcement

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[19] As this Court has observed, subject matter jurisdiction "is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * *." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). A citizen plaintiff must satisfy the conditions set forth in Section 505 to state a cause of action falling within the federal court's subject matter jurisdiction. To obtain relief, the citizen must also demonstrate, of course, that he possesses standing to bring the action and that he is entitled to an available remedy. See 442 U.S. at 239 n.18. See also notes 34, 35, *infra*.

[20] See *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986); *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); see also *City of Evansville* v. *Kentucky Liquid Recycling*, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (dicta).

[21] "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See *United States* v. *James*, No. 85-434 (July 2, 1986), slip op. 6-8; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

actions against persons "alleged to be in violation" (33 U.S.C. 1365(a)) of Clean Water Act effluent standards. By its express terms, Section 505(a) authorizes a citizen to bring a suit upon an *allegation* of *present* noncompliance. This language cannot be sensibly read, as the court below would have it (Pet. App. 17a), to authorize citizen suits based solely on an allegation of "permit violations committed *entirely in the past*" (*ibid.* (emphasis added)).[22] But neither can Section 505(a) be read, as Gwaltney would have it (Pet. Br. 11 & n.10, 38), to require a citizen to *prove* a present violation as a jurisdictional precondition to bringing a citizen suit.[23] The legis-

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[22] Congress's use of the present infinitive phrase "to be in violation" reasonably encompasses both continuous violations and intermittent violations that may recur on a regular, seasonal, or episodic basis. See *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1093 & n.3. See also, *e.g.*, 118 Cong. Rec. 33693 (1972) (1 *Leg. Hist.* [illegible]) (Sen. Muskie) ("Citizen suits can be brought to enforce against both continuous and intermittent violations."). Indeed, even Gwaltney concedes that Section 505(a) allows suits to abate ongoing violations, including actions against the "chronic episodic violator who fortuitiously avoids a permit exceedence on the day of suit" (Pet. Br. 16-17; see *id.* at 29 n.30). But Section 505(a)'s plain terms do not authorize citizen suits solely to collect civil penalties for wholly past violations that have no prospect of recurrence. See also CWA 505(g), 33 U.S.C. 1365(g) (defining "citizen" as a person "having an interest which *is or may be* adversely affected") (emphasis added). We believe that the court of appeals (and the district court decisions on which it relies (Pet. App. 10a-11a)) are plainly mistaken on this point.

[23] Section 505's use of the word "alleged" in conjunction with the phrase "to be in violation" indicates that for purposes of satisfying the statutory threshold, the question whether the citizen plaintiff has an actionable claim—and likewise whether the district court may hear that action—depends on the allegations contained in the complaint rather than the proof eventually adduced at trial. Gwaltney, at bottom, simply contends that the phrase "alleged to be in violation" should be treated as meaning "in violation" (see Pet. Br. 11 n.10, 37-43). "The short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979). "It is a familiar principle of statutory con-

lative history provides no basis for deviating from Section 505(a)'s unambiguous language. The committee reports all discuss citizen suits in the context of seeking abatement of present violations.[24] Furthermore, the reports consistently adhere to the statutory formulation, requiring an allegation of present noncompliance.[25]

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struction that courts should give effect, if possible, to every word that Congress has used in a statute." *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 530 n.15 (1985). *See, e.g., Lowe* v. *SEC*, 472 U.S. 181, 207 n.53 (1985); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). That principle has particular force here, where the legislative history suggests that Congress intentionally chose this language (see note 25, *infra*) and the language is fully consistent with Congress's expressed objectives (see pages 18-22, *infra*).

[24] See S. Conf. Rep. 92-1236, 92d Cong., 2d Sess. 145 (1972) (1 *Leg. Hist.* 328); H.R. Rep. 92-911, 92d Cong., 2d Sess. 132-134 (1972) (1 *Leg. Hist.* 819-821); *id.* at 407 (1 *Leg. Hist.* 876) (additional views of Rep. Abzug); S. Rep. 92-414, 92d Cong., 1st Sess. 79-82 (1971) (2 *Leg. Hist.* 1497-1500); see also 118 Cong. Rec. 33693 (1972) (1 *Leg. Hist.* 163) (Sen. Muskie); 118 Cong. Rec. 33717 (1972) (1 *Leg. Hist.* 221) (Sen. Bayh); 118 Cong. Rec. 10203 (1972) (1 *Leg. Hist.* 347) (Rep. Madden). As the court of appeals noted (Pet. App. 14a), Senator Muskie stated at one point that "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (1 *Leg. Hist.* 179) (emphasis added). However, that statement, read in context, simply indicates that an allegation of a present intermittent violation will typically rest (as in the instant case) upon a past pattern of chronic violations. See *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1093 & n.3.

[25] See S. Conf. Rep. 92-1236, *supra*, at 145 (1 *Leg. Hist.* 328) ("Anyone may initiate a civil suit against any person who is *alleged to be in violation* of an effluent limitation * * *.") (emphasis added); H.R. Rep. 92-911, *supra*, at 133 (1 *Leg. Hist.* 820) ("Subsection (a) of section 505 authorizes a citizen to bring a civil action against any person * * * who is alleged to *be in violation* of effluent standards * * *.") (emphasis added); S. Rep. 92-414, *supra*, at 79 (2 *Leg. Hist.* 1497) (Section 505 "is carefully restricted to actions where violations of standards and regulations * * * *are alleged*.") (emphasis added).

The Clean Water Act's structure and objectives fully support interpreting Section 505(a) according to its plain terms.[26] Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (CWA § 101(a), 33 U.S.C. 1251(a)), and it gave EPA and the individual states broad power to achieve that goal through actions to ensure present compliance and to penalize past violations (see pages 10-14, *supra*). But Congress determined, not surprisingly, that private enforcement should be specifically directed toward persons "alleged to be in violation" of the Act's requirements. Congress supplemented government enforcement resources in precisely those cases, involving allegations of ongoing noncompliance, that present the most pressing need for prompt enforcement action.[27]

Furthermore, we believe that Congress's use of the phrase "alleged to be in violation" reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards.[28] As Congress recognized in the case of the

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[26] When interpreting a provision of a complex statute like the Clean Water Act a court may appropriately "look to the provisions of the whole law, and to its objects and policy." See, *e.g.*, *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10; *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), slip op. 6 (citations omitted).

[27] See *City of Evansville* v. *Kentucky Liquid Recycling*, 604 F.2d 1008, 1015 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) ("Section 505 evidences a congressional intent to carefully channel public participation in the enforcement of the Act.") (footnote omitted). Plainly, enforcement actions brought simply to obtain civil penalties for nonrecurring past violations are of lesser urgency in achieving the Act's principal goal of immediate pollution abatement, though such penalties can have a significant deterrent effect and thus may play an important role in the government's overall enforcement strategy.

[28] This language originated in the citizen suit provisions of the Clean Air Act (§ 304, 42 U.S.C. 7604), which presents similar problems in detecting and proving chronic episodic violations. The

Clean Water Act, an enforcement action—whether brought by the EPA, the states, or private citizens—will usually be based upon the permit violations revealed in the permittee's own discharge monitoring reports.[29] But in most cases, those reports are not publicly available for several weeks (or longer, depending on the permit requirement) following the month in which the violations take place.[30] Thus, it is not generally possible for a citizen to know a company's precise compliance status on the day—or even the month—in which he files his complaint. Section 505(a)'s specification that a citizen may initiate a private enforcement action on the basis of an allegation —rather than proof—of present noncompliance allows the citizen to commence suit upon a reasonably based good-faith belief of ongoing noncompliance. The statutory scheme wisely postpones the question whether the defendant is in fact failing to comply with his permit requirements for adjudication on the merits.[31]

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language is repeated in other statutes authorizing citizen suits. See, *e.g.*, Resource Conservation and Recovery Act § 7002, 42 U.S.C. (& Supp. III) 6972; Toxic Substances Control Act § 20, 15 U.S.C. 2619.

[29] See, *e.g.*, S. Rep. 92-414, *supra*, at 62 (2 *Leg. Hist.* 1480); *id.* at 81 (2 *Leg. Hist.* 1499).

[30] For example, the discharger must analyze samples, make the necessary time-averaging calculations, prepare the reports, and submit them to EPA or the state enforcement agency. Citizens may also encounter additional delays in obtaining the reports from the appropriate governmental unit. See J.A. 82.

[31] Gwaltney's suggestion that a citizen plaintiff should base his complaint on a "current DMR" (Pet. Br. 19) misconceives the problem—"current DMRs" provide only *past* compliance information. For example, respondents filed their complaint on June 15, 1984, citing violations recounted in Gwaltney's most current publicly available discharge monitoring report—the March 1984 DMR. See Complaint Exhs. A & B. They promptly moved for partial summary judgment (which Gwaltney did not oppose) citing those violations as well as Gwaltney's long history of ongoing violations. See Motion for Judgment on the Pleadings (July 25, 1984). We understand that at the time the district court granted partial

In short, Section 505's plain language, legislative history, structure, and objectives, all support the conclusion that a citizen states a claim within the district court's jurisdiction by alleging that a NPDES permit holder is failing to comply with his permit. A complaint that fails to allege present noncompliance does not satisfy Section 505 and is subject to dismissal.[32]

There is no merit, we submit, either to the court of appeals' much more expansive interpretation of Section 505(a) or to Gwaltney's crabbed construction of that same provision. The court of appeals' conclusion that a citizen may bring an enforcement action simply to assess civil penalties for past nonrecurring violations rests on the mistaken premise that the citizen's private enforcement powers are coextensive with those of the government. See Pet. App. 9a-13a. But the government plainly has far broader enforcement powers (see pages 10-14, *supra*), including express authority—which Congress denied to private citizens—to seek civil penalties for wholly past permit violations.[33] Indeed, if Congress were to

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summary judgment, on August 30, 1984, Gwaltney's June 1984 DMR—the first report in nine months showing no violations—was not publicly available. Even if it had been available, that isolated DMR, when examined in the context of Gwaltney's five-year history of chronic noncompliance, offered no assurance that the company had ceased violating its permit.

[32] If the citizen fails to allege a present violation, his complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. See, *e.g.*, 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.07[2.-5] (2d ed. 1986). Furthermore, a citizen's failure to allege a present violation also constitutes a jurisdictional defect that would justify dismissal under Fed. R. Civ. P. 12(b)(1). See note 19, *supra*; *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986); *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985); see also 2A J. Moore & J. Lucas, *supra* ¶ 12.07[2.-1].

[33] Section 309 authorizes the federal government to bring civil actions for injunctive relief (33 U.S.C. 1319(a)(3) and (b)) and—as a wholly separate matter—suits for civil penalties (33 U.S.C. 1319(d)). See pages 11-13, *supra*. The civil penalty remedy

grant private citizens enforcement powers coextensive with those of the government, serious constitutional questions would arise.[34]

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is "separably authorized in a separate and distinct statutory provision" (*Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), slip op. 12) that rests upon an independent cause of action (28 U.S.C. 2461) and grant of jurisdiction (28 U.S.C. 1345, 1355). Section 505, by contrast, contains a single mechanism for a citizen to seek an injunction and the imposition of civil penalties, limiting suits for those remedies to actions against a "person who is alleged to be in violation" of his permit. The marked divergence between the language of Section 309 and that of Section 505 persuasively demonstrates that Congress gave the government—but not private citizens—the power to seek civil penalties for wholly past violations.

[34] Article III of the Constitution requires that a plaintiff, at a minimum, "'"show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" • • • and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" • • •."'" *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 7 (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted)). Article III therefore necessitates a "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." See *Allen* v. *Wright*, 468 U.S. 737, 752 (1984). Section 505, if construed according to its plain terms, is consistent with Article III's threshold requirements. A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Indeed, if Congress were to give private citizens untrammeled authority to seek penalties for wholly past violations—oblivious to Article III's requirement that a litigant have a personal stake in the controversy—it would intrude upon the Executive's respon-

Gwaltney's contention that a citizen must prove a present violation as a jurisdictional prerequisite to bringing a suit under the statute is likewise flawed. Gwaltney urges the Court to ignore Congress's use of the word "alleged" on the ground that the term, if given its ordinary meaning, would reduce Section 505(a) to a "mere rule of pleading, easily overcome simply by alleging a continuing violation" (Pet. Br. 38). But Section 505(a)'s requirement that a citizen premise his suit upon an allegation of present noncompliance imposes a *substantive* limitation on citizen enforcement authority. It defines the character of his cause of action and specifically precludes a citizen from initiating a suit solely for the purpose of penalizing past violations. See notes 32 & 34, *supra*.

Congress undoubtedly intended that citizen enforcement actions would be brought in conformity with the applicable pleading rules set forth in the Federal Rules of Civil Procedure. Thus, if a plaintiff's allegation of present noncompliance fails to comply with Rule 11—which specifically requires that the citizen's allegations be based on a good faith belief, formed after reasonable inquiry, that it is "well grounded in fact" (Fed. R. Civ. P. 11)—his suit is subject to dismissal. But his complaint should be dismissed, not simply as a sanction for violating Rule 11, but because Congress did not intend that Section 505(a)'s substantive prerequisite for a bringing a citizen suit—an allegation of present noncompliance—could be satisfied through bad-faith or unreasonably based contentions.[35]

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sibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.

[35] The adequacy of the citizen plaintiff's allegations cannot be challenged through a motion to dismiss for failure to state a claim (Fed. R. Civ. P. 12(b)(6)) because that rule requires the court to assume, for purposes of the motion, that all of the allegations are true. See, *e.g.*, 2A J. Moore & J. Lucas, *supra* ¶ 12.07[2.5]. But the citizen's allegations can be tested through a motion to

C. Respondents Properly Alleged That Gwaltney Was In Violation Of Its NPDES Discharge Permit

We now turn to the application of Section 505's requirements to the instant case. Gwaltney portrays itself as a company, conscientiously striving to meet its NPDES permit requirements, that was wrongly sued after achieving full compliance through "state of the art" technology (Pet. Br. 3-7, 9, 19-21, 43-44). We believe that the record here and the district court's findings paint a markedly different picture. The record shows that Gwaltney continually showed disregard for its environmental compliance obligations, that it eventually upgraded its simple wastewater treatment facilities through rather rudimentary improvements but continued to violate its discharge permit, and that respondents therefore brought suit to enjoin Gwaltney's ongoing noncompliance. Respondents

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dismiss for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), which permits the court to look behind the bare pleadings. See, *e.g.*, 2A J. Moore & J. Lucas, *supra*, ¶ 12.07[2.-1]. The threshold jurisdictional inquiry is limited, of course, to whether the citizen has satisfactorily *alleged* present noncompliance. CWA § 505(a), 33 U.S.C. 1365(a). The citizen need not prove the existence of a violation—a matter that may be impossible to prove at the preliminary stages of the litigation (see pages 18-19, *supra*). He need only show that his allegations satisfy the Rule 11 standards of good faith and reasonableness implicit in Section 505(a). Cf. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938).

Gwaltney's arguments concerning a plaintiff's obligation to prove jurisdictional facts (Pet. Br. 38-41)—even if they are correct—are simply inapposite in the present situation, where Congress has expressly premised the existence of a citizen cause of action and the court's resultant statutory jurisdiction on the citizen's *allegations*, rather than the facts he proves at trial. The citizen must, of course, prove those allegations to sustain his suit and obtain an injunctive remedy, but that presents an entirely distinct question. "A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the 'preconditions' for such equitable remedies." *Davis* v. *Passman*, 442 U.S. at 240 n.18.

properly stated a cause of action within the district court's jurisdiction and Gwaltney has failed to provide a persuasive reason why that jurisdiction should abate. The court of appeals' judgment should therefore be affirmed, despite that court's misunderstanding of the proper jurisdictional inquiry.

The record indicates that Gwaltney's compliance history prior to suit was, by any reasonable standard, abysmal. The facility violated its NPDES permit "on at least 237 occasions" between January 1979 and June 1984 (J.A. 58). Gwaltney conceded responsibility for more than 150 violations occurring after it purchased the facility in October 1981 (Pet. App. 87a). Gwaltney violated its permit 41 times in the three months immediately prior to respondents' February 29, 1984, letter informing the company of their intention to bring a citizen enforcement action (J.A. 116-117). And Gwaltney violated its permit on 13 additional occasions between the time Gwaltney received that notice and respondents filed suit (*ibid.*).[36]

The record further shows that respondents' June 15, 1984, complaint properly states a cause of action under Section 505. The complaint unambiguously alleged that Gwaltney was continually violating its permit.[37] Given

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[36] The district court later described Gwaltney's ongoing violations of the fecal coliform/chlorine standards as reflecting "an exceedingly unconcerned" attitude and "lackadaisical approach" that "border[ed] on benign neglect" (J.A. 108). It added that Gwaltney, by its own admission, "could have begun addressing the problems in its [TKN] biological treatment system substantially earlier" (J.A. 114).

[37] Gwaltney's suggestion to this Court (Pet. Br. 41 & n.54) that respondents' complaint alleged past and future—but not present—noncompliance is plainly without merit. Respondents' complaint alleged, inter alia, that Gwaltney "has violated the waste water discharge limits contained in its NPDES permit, as set forth in a letter to [Gwaltney] dated February 29, 1984"; that Gwaltney "*has continued to violate* its discharge permit since [respondents'] letter dated February 29, 1984"; and that respondents "believe and allege that, without the imposition of appropriate

Gwaltney's existing compliance record, there can be no serious dispute that respondents' allegations of continuing noncompliance were made in good faith and were well-grounded in fact at the time the complaint was filed. Gwaltney had repeatedly promised compliance (see, *e.g.*, J.A. 16, 29-30, 35-37, 51) but continued to violate its permit (see J.A. 116-117). Respondents were fully justified in concluding that nothing short of legal action would prompt Gwaltney to comply.[38]

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fines and issuance of an injunction, defendant Gwaltney * * * *will continue to violate* its NPDES permit." Pet. App. 82a-83a (emphasis added). Respondents specifically requested, among other relief, that the court "[d]eclare defendant Gwaltney of Smithfield, Ltd. to have violated and *to be in violation* of the Clean Water Act, 33 U.S.C. Sections 1311 and 1342" (Pet. App. 83a (emphasis added)). That complaint plainly met Section 505(a)'s threshold requirement that a citizen allege present noncompliance.

[38] Gwaltney now asserts, in hindsight, that respondents' allegations were unreasonable because it had ceased its fecal coliform/chlorine violations "aside from start-up exceedences" over 20 months prior to suit and because Gwaltney had installed a "new, state of the art treatment system" and, therefore, the company's "record of *past* TKN noncompliance was not at all indicative of present, ongoing violations" (Pet. Br. 41-42). This argument, had it been raised at the time the complaint was filed, would certainly have been rejected. First, a citizen plaintiff may allege ongoing permit noncompliance based on a defendant's continuing violation of different effluent parameters. See CWA § 505(f), 33 U.S.C. 1365(f) (defining "effluent standard or limitation" to include "a permit *or* condition thereof" (emphasis added)). Furthermore, Gwaltney's water treatment system is in no sense technically innovative; it involves a simple chlorination and lagoon retention process commonly used in small wastewater treatment plants. See J.A. 18-27. Gwaltney's long overdue improvements to its system were quite rudimentary (see *ibid.*; Pet. App. 90a-93a). Moreover, Gwaltney repeatedly represented that it would achieve full compliance within forty-five days after modifying the system (J.A. 38, 39). Gwaltney completed its modifications on October 18, 1983, but continued to violate the fecal coliform parameter in December 1983 and February 1984 (J.A. 116). And Gwaltney violated its TKN parameter in *every* month from October 1983 to May 1984. Thus—

Indeed, Gwaltney made virtually no effort to deny respondents' allegations in its July 5, 1984 answer to the complaint. Gwaltney merely stated, as an *affirmative defense*, that "the defendant has taken every reasonable means to correct and prevent further violations of its NPDES permit and there should be no further violations of same in the future" (Answer 3 (July 5, 1984)).[39] Gwaltney did move to dismiss the action, but only on the ground that "the cause of action is not matured under the Clean Water Act as the State Water Control Board of Virginia is bringing suit in the State Courts of the Commonwealth of Virginia to insure compliance by the defendant with the requirements of its NPDES permit" (*ibid.*). Thus, Gwaltney sought dismissal solely on the basis that the Virginia State Water Control Board would bring its own enforcement action "to insure compliance" and that respondents brought their suit too soon rather than too late.

If there were any doubt whether the respondents had stated a proper cause of action, it was resolved through the district court's ruling on the merits. After filing their complaint, respondents promptly moved for partial summary judgment. See Motion for Judgment on the Pleadings (July 25, 1984). They supported their motion with an affidavit stating that Gwaltney's "permit violations are ongoing; more violations have appeared each

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as the district court later found (J.A. 83 n.8)—Gwaltney could not credibly contend that it had achieved compliance at the time respondents filed their complaint. Even if some of Gwaltney's discharges may have been "largely uncontrollable" and therefore did not warrant enhanced civil penalties (see Pet. Br. 20; J.A. 115), they were nevertheless violations indicating noncompliance. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975).

[39] Gwaltney later conceded that its answer did not admit or deny respondents' averments and that the district court's subsequent order granting partial summary judgment "rendered moot" the filing of such a responsive pleading. See Defendant's Memorandum in Support of Motion for Rehearing 3, 14 (Oct. 16, 1984).

time [respondents] have updated their research." Affidavit of Jeter M. Watson Supporting Plaintiffs' Motion for Summary Judgment 4 (June 29, 1984). Gwaltney did not dispute that affidavit; indeed, it filed no response at all to respondents' motion. The district court entered partial summary judgment on August 30, 1984, finding Gwaltney "to have violated and to be in violation" of the Clean Water Act (J.A. 59). Thus, the court determined, based on respondents' uncontested allegations, that Gwaltney was presently "in violation of its permit requirements."[40]

In these circumstances, there can be no serious doubt that respondents properly stated a cause of action under Section 505 that fell within the district court's subject matter jurisdiction. Thus, the only remaining question is whether Gwaltney's subsequent claims of compliance should divest the court of jurisdiction. The answer is controlled by familiar and generally applicable mootness principles governing injunctive actions.

This Court has long recognized that "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).[41] But jurisdiction, properly acquired, may abate

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[40] The record suggests that even if Gwaltney had contested the motion for summary judgment, its efforts would have been unavailing. At the time the court ruled on the motion for summary judgment, seven of the company's last nine discharge monitoring reports showed violations. See J.A. 116-117. The two reports showing no violations, the June 1984 and the July 1984 DMRs (which apparently were not publicly available, see note 31, *supra*), monitored Gwaltney's effluent during the summer months, when TKN violations were unlikely to occur. Thus, they gave no assurance that Gwaltney could remain in compliance through the winter months. See J.A. 83 n. 8.

[41] "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal con-

"if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated'" (*id.* at 633 (citation omitted)). The defendant's burden "'is a heavy one.'" *Davis*, 440 U.S. at 631 (quoting *W.T. Grant Co.*, 345 U.S. at 633).[42] These principles—which, like the requirement of standing, embrace core Article III concerns—are fully applicable to Clean Water Act citizen suits, which must be predicated upon an allegation of present noncompliance. See notes 32, 35, *supra*.

We can envision situations where a defendant might establish that its cessation of permit violations renders a citizen suit, properly initiated upon an allegation of ongoing violation, nonjusticiable. But the instant case does not fall within that description. The district court determined on August 30, 1984—ten weeks after the complaint was filed—that Gwaltney was "in violation" of the Clean Water Act. Gwaltney did not raise its belated claim of present compliance until May 16, 1985, six months after the district court's trial on an appropriate remedy and nearly one year after the complaint was

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duct." *W.T. Grant Co.*, 345 U.S. at 633. These principles apply even when the cessation occurs prior to the filing of the complaint. See, *e.g.*, *United States* v. *Parke Davis & Co.*, 362 U.S. 29, 48 (1960). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

[42] This Court has refused to dismiss on mootness grounds where, for example, "it is not 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980) (quoting *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). But even if a court refuses to dismiss on jurisdictional grounds, it may still deny relief on the merits, on legal, factual or equitable grounds. *Id.* at 203-204. See, *e.g.*, *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

filed.[43] The district court found that Gwaltney's own witness had expressed doubt at trial whether the company could remain in compliance through the upcoming winter (J.A. 83 n.8, 111). The court ultimately concluded that "Gwaltney appears to have achieved compliance" (J.A. 111 n.25), noting that a contrary conclusion "would be too speculative given the present record" (J.A. 112 n.26). But the court clearly was unconvinced that there was no reasonable prospect of future noncompliance; it mandatorily enjoined Gwaltney to provide respondents with "all reports [Gwaltney] submits to state or federal government[s] relating to its NPDES permit" including monthly discharge monitoring reports detailing Gwaltney's compliance status (J.A. 119).

Thus, the record and the district court's determinations indicate that Gwaltney failed to show that " 'there is no reasonable expectation that the wrong will be repeated' " (*W.T. Grant Co.*, 345 U.S. at 633). The district court therefore had jurisdiction to enter an appropriate remedy. The question whether the court abused its discretion in formulating its remedy (Pet. Br. 42-43)—like questions surrounding citizen settlement practices (Pet. Br. 30-32)—is not, of course, before this Court.

In sum, we submit that the courts below reached the correct result in holding that Gwaltney was not entitled to a dismissal of respondents' suit under Fed. R. Civ. P. 12(b)(1). Respondents properly alleged Gwaltney

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[43] Gwaltney now places great reliance on a December 17, 1984, joint pretrial stipulation filed by Gwaltney and respondents, claiming that it represents a concession that Gwaltney was in present compliance with its permit requirements (Pet. Br. 7). However, that stipulation simply states that ["Gwaltney's] DMR's [Exhibit 10] do not reflect any permit violations on any occasion subsequent to May 15, 1984" (Pet. App. 86a). Respondents did not concede that Gwaltney had ceased continuing to violate its permit; they simply stipulated to the contents of Gwaltney's discharge monitoring reports (which, even at that time, were available only up to August 1984) for the purpose of determining an appropriate civil penalty.

"to be in violation" of its NPDES permit and the record findings reveal no reason under traditional principles governing injunctive actions why the district court should have been divested of jurisdiction. That should be the end of the jurisdictional inquiry.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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